



**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2017-0502; FRL-9984-48-Region 3]**

**Approval and Promulgation of Air Quality Implementation Plans;  
West Virginia; Permits for Construction and Major Modification of Major Stationary  
Sources for the Prevention of Significant Deterioration of Air Quality**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the State of West Virginia. This revision pertains to West Virginia's Prevention of Significant Deterioration (PSD) program. This action is being taken under the Clean Air Act (CAA).

**DATES:** This final rule is effective on [insert date 30 days after date of publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2017-0502. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the person identified in the "For

Further Information Contact” section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** David Talley, (215) 814-2117, or by e-mail at [talley.david@epa.gov](mailto:talley.david@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On July 5, 2018 (83 FR 31348), EPA published a notice of proposed rulemaking (NPRM) for the State of West Virginia. In the NPRM, EPA proposed approval of a revision to the PSD regulations found at title 45, chapter 14 of the Code of State Rules (CSR) as a revision to the West Virginia SIP. The formal SIP revision was submitted by West Virginia Department of Environmental Protection (WVDEP) on behalf of the State of West Virginia on June 6, 2017.

WVDEP’s June 6, 2017 SIP submittal included a number of revisions to West Virginia’s PSD regulations under 45CSR14. The revisions were largely non-substantive and administrative in nature. However, as discussed in subsequent sections of this notice, WVDEP’s SIP submittal also contained revisions to PSD provisions relating to the regulation of greenhouse gases (GHGs).

In a June 3, 2010 final rulemaking action, EPA promulgated regulations known as “the Tailoring Rule,” which phased in permitting requirements for GHG emissions from stationary sources under the CAA PSD and title V permitting programs. *See* 75 FR 31514. For Step 1 of the Tailoring Rule, which began on January 2, 2011, PSD or title V requirements applied to sources of GHG emissions only if the sources were subject to PSD or title V “anyway” due to their emissions of non-GHG pollutants. These sources are referred to as “anyway sources.” Step 2 of

the Tailoring Rule, which began on July 1, 2011, applied the PSD and title V permitting requirements under the CAA to sources that were classified as major, and, thus, required to obtain a permit, based solely on their potential GHG emissions. Step 2 also applied to modifications of otherwise major sources that required a PSD permit because they increased only GHGs above applicable levels in the EPA regulations.

On June 23, 2014, the United States Supreme Court, in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency*,<sup>1</sup> issued a decision addressing the Tailoring Rule and the application of PSD permitting requirements to GHG emissions. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). The Supreme Court decision effectively upheld PSD permitting requirements for GHG emissions under Step 1 of the Tailoring Rule for “anyway sources” and invalidated PSD permitting requirements for Step 2 sources.

In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an amended judgment vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of the Tailoring Rule.<sup>2</sup> The amended judgment preserves, without the need for additional rulemaking by the EPA, the application of the BACT requirement to GHG emissions from sources that are required to obtain a PSD permit based on emissions of pollutants other than

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<sup>1</sup> See 134 S.Ct. 2427.

<sup>2</sup> *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, 06/26/20, judgment entered for No. 09-1322 on 04/10/2015.

GHGs (i.e., the “anyway” sources). The D.C. Circuit’s judgment vacated the regulations at issue in the litigation, including 40 CFR 51.166(b)(48)(v), “to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification.”<sup>3</sup>

In response to these court decisions, EPA took final action on August 19, 2015 to remove the vacated elements from the federal PSD program. *See* 80 FR 50199. As discussed further in Section II of this notice, WVDEP’s June 6, 2017 submittal included revisions enacted in order to make WVDEP’s PSD program consistent with the federal program.

## **II. Summary of SIP Revision and EPA Analysis**

WVDEP’s June 6, 2017 submittal included revisions to the definition of “subject to regulation” at subdivision 2.80 of 45-14-2. Specifically, subdivisions 2.80.e, 2.80.f, and 2.80.g were deleted in their entirety. These subdivisions were the mechanism through which WVDEP implemented the Tailoring Rule Step 2 provisions which were vacated and revised by EPA as a result of the *UARG v. EPA* decision discussed in Section I of this notice. WVDEP’s revised definition of “subject to regulation” is consistent with the federal definition at 40 CFR 51.166(b)(48)(v) and 52.21(b)(49)(v), and ensures that the preconstruction permitting requirements of WVDEP’s PSD program will be applied to GHG sources in a manner consistent with the Supreme Court decision in *UARG v. EPA*. Further, EPA finds that these deletions are in accordance with section 110(l) of the CAA because they will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement.

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<sup>3</sup> *Id.*

In addition to the previously discussed revisions, WVDEP's June 6, 2017 submittal included a number of non-substantive, clarifying or administrative revisions. These include the filing date and effective date at subdivisions 45-14-1.3 and 45-14-1.4, and the removal of references to the deleted subdivisions discussed in Section II.A of this notice. WVDEP provided an underline/strikeout version of 45CSR14 so that all of the revisions can be tracked. A copy of this is included in the docket for today's action.

Other specific requirements of West Virginia's June 6, 2017 submittal and the rationale for EPA's proposed action are explained in the NPR and will not be restated here.

### **III. Public Comments**

EPA received one set of comments on the July 5, 2018 NPR. These comments are included in the docket for this action. However, the comments did not concern any of the specific issues raised in the NPR, nor did they address EPA's rationale for the proposed approval of WVDEP's submittal. Therefore, EPA is not addressing them here.

### **IV. Final Action**

EPA is approving WVDEP's June 6, 2017 submittal as a revision to the West Virginia SIP.

### **V. Incorporation by Reference**

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the West Virginia rules regarding definitions and permitting requirements discussed in Section II of this preamble. EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and at the EPA Region III Office (please contact the person

identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.<sup>4</sup>

## **VI. Statutory and Executive Order Reviews**

### **A. General Requirements**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);

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<sup>4</sup> 62 FR 27968 (May 22, 1997).

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

## **B. Submission to Congress and the Comptroller General**

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory

Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

### **C. Petitions for Judicial Review**

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action pertaining to West Virginia’s PSD program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)



**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 10, 2018.

Cecil Rodrigues,  
Acting Regional Administrator,  
Region III.

40 CFR Part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 et seq.

**Subpart XX—West Virginia**

2. In § 52.2520, the table entitled “EPA-Approved Regulations in the West Virginia SIP” in paragraph (c) is amended by revising the entries for sections 45-14-1 through 45-14-21, 45-14-25, and 45-14-26 to read as follows:

**§ 52.2520 Identification of plan.**

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(c) \*\*\*

**EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP**

<b>State citation [Chapter 16-20 or 45 CSR ]</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/ citation at 40 CFR 52.2565</b>
* * * * *				
<b>[45CSR] Series 14 Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration</b>				
Section 45-14-1	General	6/1/17	<u><b>[Insert date of publication in the Federal Register] [Insert Federal Register citation]</b></u>	Administrative changes.
Section 45-14-2	Definitions	6/1/17	<u><b>[Insert date of publication in the</b></u>	Administrative changes; revised definition of

<b>State citation [Chapter 16-20 or 45 CSR ]</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/ citation at 40 CFR 52.2565</b>
			<b><u>Federal Register]</u></b> <b><u>[Insert Federal Register citation]</u></b>	“subject to regulation.”
Section 45-14-3	Applicability	6/1/17	<b><u>[Insert date of publication in the Federal Register]</u></b> <b><u>[Insert Federal Register citation]</u></b>	New state effective date.
Section 45-14-4	Ambient Air Quality Increments and Ceilings	6/1/17	<b><u>[Insert date of publication in the Federal Register]</u></b> <b><u>[Insert Federal Register citation]</u></b>	New state effective date.
Section 45-14-5	Area Classification	6/1/17	<b><u>[Insert date of publication in the Federal Register]</u></b> <b><u>[Insert Federal Register citation]</u></b>	New state effective date.
Section 45-14-6	Prohibition of Dispersion Enhancement Techniques	6/1/17	<b><u>[Insert date of publication in the Federal Register]</u></b>	New state effective date.

<b>State citation [Chapter 16-20 or 45 CSR ]</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/ citation at 40 CFR 52.2565</b>
			<u>[Insert Federal Register citation]</u>	
Section 45-14-7	Registration, Report and Permit Requirements for Major Stationary Sources and Major Modifications	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	Administrative changes.
Section 45-14-8	Requirements Relating to Control Technology	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	Administrative changes.
Section 45-14-9	Requirements Relating to the Source's Impact on Air Quality	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	Administrative changes.
Section 45-14-10	Modeling Requirements	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal</u>	New state effective date.

<b>State citation [Chapter 16-20 or 45 CSR ]</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/ citation at 40 CFR 52.2565</b>
			<b><u>Register citation]</u></b>	
Section 45-14-11	Air Quality Monitoring Requirements	6/1/17	<b><u>[Insert date of publication in the Federal Register] [Insert Federal Register citation]</u></b>	Administrative changes.
Section 45-14-12	Additional Impacts Analysis Requirements	6/1/17	<b><u>[Insert date of publication in the Federal Register] [Insert Federal Register citation]</u></b>	New state effective date.
Section 45-14-13	Additional Requirements and Variances for Source Impacting Federal Class 1 Areas	6/1/17	<b><u>[Insert date of publication in the Federal Register] [Insert Federal Register citation]</u></b>	Administrative changes.
Section 45-14-14	Procedures for Sources Employing Innovative Control Technology	6/1/17	<b><u>[Insert date of publication in the Federal Register] [Insert Federal Register citation]</u></b>	Administrative changes.

<b>State citation [Chapter 16-20 or 45 CSR ]</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/ citation at 40 CFR 52.2565</b>
Section 45-14-15	Exclusions From Increment Consumption	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	Administrative changes.
Section 45-14-16	Specific Exemptions	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	Administrative changes.
Section 45-14-17	Public Review Procedures	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	Administrative changes.
Section 45-14-18	Public Meetings	6/1/17	<u>[Insert date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	New state effective date.
Section 45-14-19	Permit Transfer, Cancellation and Responsibility	6/1/17	<u>[Insert date of</u>	Administrative changes.

<b>State citation [Chapter 16-20 or 45 CSR ]</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/ citation at 40 CFR 52.2565</b>
			<u><b>publication in the Federal Register]</b></u> <u><b>[Insert Federal Register citation]</b></u>	
Section 45-14-20	Disposition of Permits	6/1/17	<u><b>[Insert date of publication in the Federal Register]</b></u> <u><b>[Insert Federal Register citation]</b></u>	New state effective date.
Section 45-14-21	Conflict with Other Permitting Rules	6/1/17	<u><b>[Insert date of publication in the Federal Register]</b></u> <u><b>[Insert Federal Register citation]</b></u>	Administrative changes.
Section 45-14-25	Actual PALs	6/1/17	<u><b>[Insert date of publication in the Federal Register]</b></u> <u><b>[Insert Federal Register citation]</b></u>	Administrative changes.
Section 45-14-26	Inconsistency Between Rules	6/1/17	<u><b>[Insert date of publication in the</b></u>	Administrative changes.

State citation [Chapter 16-20 or 45 CSR ]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
			<u>Federal Register</u> [Insert Federal Register citation]	
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[FR Doc. 2018-20966 Filed: 9/26/2018 8:45 am; Publication Date: 9/27/2018]